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VIVINT, INC.

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

DANA HUGHES, individually and  
on behalf of all others similarly  
situated,

Plaintiffs,

v.

VIVINT, INC., a New Jersey  
Corporation; and DOES 1 through 25,  
inclusive,

Defendant.

**CASE NO.:** 2:24-cv-03081-GW (KSx)

(Superior Court of California, County of  
Los Angeles, Case No. 24STCV06156)

**DEFENDANT VIVINT, INC.'S  
NOTICE OF MOTION; MOTION TO  
DISMISS; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION TO  
DISMISS AMENDED COMPLAINT**

**Action Filed:** March 12, 2024

**Action Removed:** April 15, 2024

RESERVED

**Hearing Date:** October 24, 2024

**Hearing Time:** 8:30 a.m.

**Courtroom:** 9D-9<sup>th</sup> Floor

**TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

**NOTICE IS GIVEN** that on **October 24, 2024, at 8:30 a.m.** or as soon  
thereafter as the matter can be heard in Courtroom **9D, 9<sup>th</sup> Floor** of the above-captioned  
court, located at 350 West First Street, Los Angeles, CA 90012, Defendant Vivint, Inc.

1 (“Vivint”) will move to dismiss all causes of action in Plaintiff’s Amended Complaint.

2 This Motion is made on grounds that the Amended Complaint remains  
3 procedurally and substantively deficient and should be dismissed with prejudice.  
4 Plaintiff has not – and cannot – allege concrete harm sufficient to satisfy Article III’s  
5 “irreducible constitutional minimum of standing,” and the Amended Complaint should  
6 be dismissed on this basis alone. In addition, Plaintiff has also failed to allege facts  
7 sufficient to confer this Court with personal jurisdiction over Vivint and has failed to  
8 state a claim for relief under the California Invasion of Privacy Act. Accordingly, the  
9 Amended Complaint should be dismissed.

10 This Motion is based on this Notice of Motion, the accompanying Memorandum  
11 of Points and Authorities, the [Proposed] Order filed concurrently, a separate Request  
12 for Judicial Notice, the pleadings and papers on file in this action, and such further oral  
13 and documentary evidence as may be presented at the hearing on this Motion.

14 This Motion is made following the conference of counsel required under L.R. 7-  
15 3 which took place on Tuesday, August 27, 2024.

16  
17 DATED: September 3, 2024

FROST BROWN TODD LLP

18  
19 By: 

20 LIAM E. FELSEN  
21 Attorneys for Defendant  
22 VIVINT. INC.  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

Defendant Vivint, Inc. (“Vivint”) respectfully submits this Memorandum of Points and Authorities in support of its Motion to Dismiss (the “Motion”) with respect to all causes of action in the Amended Complaint (the “Amended Complaint”) filed by Plaintiff Dana Hughes (“Plaintiff”) against Vivint.

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Plaintiff’s attempt to amend her Complaint to cure the procedural and substantive deficiencies has failed, and the Amended Complaint should be dismissed with prejudice. Plaintiff has not – and cannot – allege concrete harm sufficient to satisfy Article III’s “irreducible constitutional minimum of standing.” The Court informed Plaintiff what she must plead to overcome dismissal; nonetheless, she again failed to meet her burden. The Amended Complaint should be dismissed on this basis alone. In addition, Plaintiff has also failed to allege facts sufficient to confer this Court with jurisdiction over Vivint; and has failed to state a claim for relief under the California Invasion of Privacy Act. Accordingly, the Amended Complaint should be dismissed.

**II. FACTUAL AND PROCEDURAL HISTORY**

Vivint is a retailer that sells home security systems. (*See* Amended Complaint at ¶ 10.) Vivint is incorporated, and maintains its principal place of business, in Utah. Vivint operates <https://www.vivint.com> (the “Website”) to market and sell its products. (*See* Amended Complaint at ¶ 10.)

Plaintiff alleges that she is a California resident whose information was sent to TikTok through software installed on the Website. (*See* Amended Complaint at ¶ 25.) Specifically, Plaintiff claims that Vivint installed software created by TikTok on the Website to identify website visitors (the “TikTok Software”). (*See* Amended Complaint at ¶ 10.)

As asserted by Plaintiff, the TikTok Software uses “fingerprinting” to collect data about an individual who visits the Website – such as the individual’s browser information, geographic information, referral tracking, and URL tracking – and matches

1 that data with existing data to “reconstruct” the individual’s identity. (*See* Amended  
2 Complaint at ¶¶ 11, 12, 17, 18.) Further, Plaintiff asserts, without factual support, that  
3 the “TikTok Software was deployed on the Website when Plaintiff visited in January  
4 2024. Accordingly, the TikTok Software gathered her information . . . in order to  
5 identify and track her.” (*See* Amended Complaint at ¶ 18.)

6 Notably, Plaintiff does not allege what device she used to access the Website,  
7 what activity she engaged in on the Website, where she accessed the Website, any  
8 concrete damages she incurred as a result of her interaction with the Website, or even  
9 that she has a TikTok account that would allow the alleged collection of her anonymous  
10 information from the Website to be associated with her and actually identify her.

11 The Website includes “Terms and Conditions” that apply to any use of Vivint’s  
12 website. (*See* Vivint’s Request for Judicial Admission, filed simultaneously with this  
13 Motion (“RJN”), Exhibit A.). The Website also includes a written “Privacy Notice.”  
14 (*See* RJN, Exhibit B.). Any individual, including Plaintiff, who visits the Website can  
15 access both the Terms and Conditions and the Privacy Notice. Vivint’s Privacy Notice  
16 communicates that “[i]n addition to collecting information directly from you, [Vivint]  
17 may receive personal information about from other individuals, from the devices you  
18 use, through data collection technologies, . . . and from other lawful sources.” (*See* RJN,  
19 Exhibit B.). Further, the Privacy Notice expressly informs Website visitors that:

- 20 • Vivint “may automatically collect information or inferences about you  
21 through tracking technologies such as cookies and tools that track your usage  
22 of Vivint websites or the Vivint mobile app.” (*See* RJN, Exhibit B.)
- 23 • Vivint “may disclose personal information . . . with [its] affiliates and  
24 subsidiaries, service providers who act on [its] behalf, [its] business partners,  
25 third parties pursuant to legal purposes, or to others at your discretion.” (*See*  
26 RJN, Exhibit B.)
- 27 • Vivint and its “service providers and business partners automatically collect  
28 certain information about you when you use and interact with [its] websites,



1 social media accounts, mobile applications, and emails . . . using tools such as  
2 cookies, web beacons, pixels, tags, embedded scripts, session replay tools,  
3 SDKs, and other tracking technologies.” (*See* RJN, Exhibit B.)

4 In addition to Vivint’s explicit disclosures, the Privacy Notice also provides clear  
5 instructions on actions individuals can take to control the information collected. (*See*  
6 RJN, Exhibit B.). Plaintiff does not allege she took any of the identified opt-out actions  
7 on her Vivint account, devices, or social media accounts.

8 On March 12, 2024, Plaintiff filed her Complaint against Vivint. Vivint removed  
9 the case to this Court and then filed a Motion to Dismiss.

10 On August 5, 2024, after oral argument, the Court granted Vivint’s Motion to  
11 Dismiss and adopted the prior July 12, 2024 tentative ruling as its Final Ruling (the  
12 “Final Ruling”), which allowed Plaintiff time to amend the Complaint. The Court, in  
13 the Final Ruling, dismissed the Complaint because Plaintiff had not alleged facts  
14 sufficient to establish Article III standing. (*See* RJN, Exhibit C.)

15 On August 19, 2024, Plaintiff filed her Amended Complaint. In the Amended  
16 Complaint, Plaintiff once again asserts that the TikTok Software is an illegal “trap and  
17 trace device” under § 638.50 of the California Invasion of Privacy Act (“CIPA”). (*See*  
18 Amended Complaint at ¶¶ 19-24.) Plaintiff also alleges that Vivint has “sufficient  
19 minimum contacts in the State of California or otherwise purposefully avails itself of  
20 the California market.” (*See* Amended Complaint at ¶ 3.) However, even though  
21 Plaintiff has now added certain new allegations (mostly conclusory), Plaintiff’s claims  
22 still fail, and the Court should similarly dismiss the Amended Complaint.

### 23 **III. ARGUMENTS AND AUTHORITIES**

24 The Amended Complaint should be dismissed for three reasons: (1) Plaintiff  
25 lacks standing because she has not alleged concrete harm; (2) Plaintiff has failed to  
26 plead facts sufficient to confer this Court with jurisdiction as to Vivint; and (3) Plaintiff  
27 fails to state a claim under CIPA, stretching the original intent of California’s Trap and  
28 Trace Law beyond recognition and threatening public policy.

1           **A. Plaintiff lacks standing because she does not allege concrete harm.**

2           Pursuant to Federal Rule of Civil Procedure 12(b)(1), a court may dismiss a  
3 complaint for lack of subject matter jurisdiction if the plaintiff does not satisfy Article  
4 III standing requirements. *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d  
5 1115, 1122 (9th Cir. 2010). Plaintiff, as the party seeking to invoke the Court’s subject  
6 matter jurisdiction, has the burden of establishing that such jurisdiction exists. *See Lujan*  
7 *v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

8           To satisfy the “irreducible constitutional minimum of standing,” Plaintiff must  
9 establish an injury that is “concrete and particularized, and actual or imminent, not  
10 ‘conjectural’ or ‘hypothetical.’” *Lujan*, 504 U.S. at 560-61 (citations omitted). “For an  
11 injury to be particularized, it must affect the plaintiff in a personal and individual way.”  
12 *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). Under Article III, a concrete injury is  
13 one that “must actually exist” and be “real, and not abstract.” *Id.* at 340. In the context  
14 of statutory claims, there is no Article III standing absent “plaintiff’s suffering concrete  
15 harm” as a result of “defendant’s violation of” the statute. *TransUnion LLC v. Ramirez*,  
16 594 U.S. 413, 426-27 (2021). The plaintiff bears the burden of establishing these  
17 elements, and “at the pleading stage, the plaintiff must ‘clearly ... allege facts  
18 demonstrating’ each element.” *Spokeo*, 578 U.S. at 338 (quoting *Warth v. Seldin*, 422  
19 U.S. 490, 518 (1975)).

20           No such concrete injury exists here. Plaintiff still fails to allege *any* harm—  
21 physical, economic, or otherwise—resulting from her use of the Vivint website. Instead,  
22 Plaintiff offers only the conclusory allegation that Vivint “uses a trap and trace process  
23 on its Website by deploying the TikTok Software,” and that Vivint “did not obtain  
24 consent from Plaintiff or any of the class members before using trap and trace  
25 technology.” (*See* Amended Complaint at ¶¶ 35, 36.) Such bald allegations of statutory  
26 violations are insufficient to confer standing. *See, e.g., Byars v. Sterling Jewelers, Inc.*,  
27 No. 5:22-cv-01456-SB-SP, 2023 WL 2996686, at \*3 (C.D. Cal. Apr. 5, 2023) (granting  
28 motion to dismiss for lack of standing because “the position that any violation of CIPA

1 necessarily constitutes an injury in fact without the need for an additional showing of  
2 harm” is “at odds with” *TransUnion*).

3 This Court’s Final Ruling articulated the deficiencies in Plaintiff’s Article III  
4 standing argument. Despite the opportunity to amend her pleadings to cure these  
5 deficiencies, her Amended Complaint still contains two major flaws: (1) the information  
6 she alleges Vivint disclosed is not personal in nature; and (2) she fails to allege facts  
7 sufficient to demonstrate that Vivint or the TikTok Software could “fingerprint” or link  
8 any data it collected to Plaintiff individually.

9 **1. The information Plaintiff alleges that Vivint and the TikTok**  
10 **Software collected is not personal in nature.**

11 Despite the Court’s clear direction in its Final Ruling, the Amended Complaint  
12 still fails to “clearly allege what personalized information of [Plaintiff’s] was actually  
13 collected” and therefore Plaintiff once again “does not identify any harm to her  
14 privacy.” (*See* RJN, Exhibit C at 7). In the Amended Complaint, Plaintiff simply asserts  
15 in a conclusory manner that the TikTok Software “gathered her information, including  
16 device and browser information, geographic information, referral tracing, and URL  
17 tracking in order to identify her.” (*See* Amended Complaint at ¶ 18.) Yet other than  
18 generically stating “her information,” the other items are not personal in nature and  
19 Plaintiff has done nothing to describe what those items are. It would be an improper  
20 expansion of existing case law to categorize those types of data as anything more than  
21 IP-address-type information, and certainly they cannot be categorized as personal.

22 California courts in cases very similar to this one have already determined that  
23 general IP address and browsing information do not contain the type of “personal  
24 information” that involves privacy concerns and that may create a concrete injury. *See*  
25 *I.C. v. Zynga, Inc.*, 600 F. Supp. 3d 1034, 1049–50 (N.D. Cal. 2022); *Lightoller v.*  
26 *Jetblue Airways Corp.*, No. 23-CV-00361-H-KSC, 2023 WL 3963823, at \*4 (S.D. Cal.  
27 June 12, 2023); *Byars*, 2023 WL 2996686 at \*3 (“Plaintiff does not allege that she  
28 disclosed any sensitive information to Defendant, much less identify any specific

1 personal information she disclosed that implicates a protectable privacy interest. She  
2 therefore has not identified any harm to her privacy.”); *Mikulsky v. Noom, Inc.*, 682 F.  
3 Supp.3d 855, 864 (S.D. Cal. 2023) (granting motion to dismiss because “the Court is  
4 unable to determine whether the ‘personal information’ Plaintiff inputted is protected  
5 or whether it was merely information akin to basic contact information that would not  
6 trigger a protectable privacy interest. Accordingly, Plaintiff’s allegation is insufficient  
7 to allege a concrete harm that is required for Article III standing”).

8 In addition, California courts have differentiated between the privacy concerns  
9 implicated by the collection of highly personal information and more generalized  
10 contact information or browsing history that does not threaten the right to privacy. For  
11 example, Plaintiff has not alleged (nor can she) that Vivint somehow collected her  
12 “likes, dislikes, interests, and habits over a significant amount of time.” *In re Facebook,*  
13 *Inc. Internet Tracking Litig.*, 956 F.3d 589, 598 (9th Cir. 2020). In contrast Plaintiff  
14 has only alleged “the collection of other, less personalized information” which does  
15 “not implicate privacy concerns.” *See Lightoller*, 2023 WL 3963823, at \*4. In  
16 analyzing this contrast, the *Lightoller* court concluded that software or code that can  
17 “intercept and record a website visitor’s . . . ‘mouse movements, clicks, keystrokes  
18 (such as text being entered into an information field or text box), URLs of webpages  
19 visited, and/or other electronic communications in real-time’” does not amount to the  
20 collection of “personal information” sufficient to establish an injury-in-fact. *Lightoller*,  
21 2023 WL 3963823, at \*4. Even the disclosure of “basic contact information, including  
22 one’s email address, phone number, or . . . username” are inadequate to establish Article  
23 III standing based on the “insufficient fit between the loss of information alleged here  
24 and the common law privacy torts of private disclosure of private facts and intrusion  
25 upon seclusion.” *Zynga, Inc.*, 600 F. Supp. 3d at 1049–50.

26 In an attempt to sidestep the foregoing analysis, the Amended Complaint now  
27 cites *Moody v. C2 Educ. Sys.*, No. 2:24-cv-04249-RGK-SK, 2024 U.S. Dist. LEXIS  
28 132614, at \*10 (C.D. Cal. July 25, 2024), in support of her allegation that invasion of

1 privacy is an actionable injury. (*See* Amended Complaint at ¶ 18.) However, the  
2 defendant in *Moody* never raised Article III standing, and the *Moody* Court never  
3 discussed it; *Moody* simply does not apply to this case. Indeed, the *Moody* Court even  
4 specifically cited to other cases where “courts found that the plaintiffs lacked injuries  
5 necessary for . . . Article III standing” but that Court did not apply the Article III legal  
6 standard, only the standard as related to Cal. Penal Code §§ 638.51 and 637.2.

7 The Court, in its prior Final Ruling, clearly stated that Plaintiff must “sufficiently  
8 explain what routing information was collected, and whether that routing information  
9 is of such a kind that it implicates a protectable privacy interest.” (*See* RJN, Exhibit C  
10 at 7). Now, Plaintiff’s second failure to appropriately plead personalized injury  
11 demonstrates not only a deficiency as to her pleadings, but also a deficiency as to the  
12 facts underlying her claim. Plaintiff’s Amended Complaint fails to allege that Vivint or  
13 the TikTok Software collected information from her that is personal in nature.

14 **2. Plaintiff fails to allege facts sufficient to demonstrate Vivint or the**  
15 **TikTok Software had the ability to “fingerprint” Plaintiff or link**  
16 **any data it collected to Plaintiff individually.**

17 The Court previously noted in the Final Ruling that any allegations by Plaintiff  
18 would “still be flawed” unless Plaintiff alleged that she has a TikTok account, holding  
19 that “[i]f Plaintiff does not have a TikTok account, then the fingerprinting process  
20 would not produce any match, meaning Plaintiff’s identity would not be connected with  
21 the anonymous information, and seemingly no harm would have occurred.” (*See* RJN,  
22 Exhibit C at 7-8). Despite the clear direction available from the Final Ruling, Plaintiff  
23 again fails to allege that Vivint or the TikTok Software *actually* “fingerprinted” her or  
24 identified her in a way that connected her identity with any otherwise anonymous  
25 information collected by the TikTok Software. *See Massie v. General Motors, LLC*, No.  
26 21-787-RGA, 2022 WL 534468, at \*5 (D. Del. Feb. 17, 2022) (holding that dismissal  
27 for lack of standing is appropriate where the plaintiff fails to explain how the  
28

1 defendant's possession of anonymized, non-personal data regarding the plaintiff's  
2 browsing activities harmed her privacy interests.").

3 In the Amended Complaint, Plaintiff offers only the conclusory allegation that  
4 "the TikTok Software gathered her information . . . *in order to* identify her." (*See*  
5 Amended Complaint, ¶ 18.) Plaintiff does *not* allege that (1) she has a TikTok account  
6 which would contain her personal information; (2) the TikTok Software *actually*  
7 identified her; (3) the TikTok Software could use information from other websites to  
8 link back and identify her; (4) any other websites that she visited which also contain the  
9 TikTok Software; (5) any other websites or accounts into which she submitted personal  
10 information that could have collected; or (6) that she inputted *any* personal information  
11 on the Website that would allow anonymous information collected from her visit to the  
12 Website to be associated back to her.

13 Instead, Plaintiff simply alleges that the TikTok Software collects the information  
14 "in order to identify her," regardless of whether it actually identifies her. (*See* Amended  
15 Complaint, ¶ 18.) Without any allegation that Vivint or the TikTok Software linked  
16 Plaintiff's anonymized, non-personal data back to her identity, Plaintiff again fails to  
17 demonstrate that Vivint could have "fingerprinted" her, no harm could have occurred,  
18 and the Court should dismiss the Amended Complaint.

19 **B. California does not have personal jurisdiction over Vivint.**

20 Plaintiff has failed to allege facts sufficient to establish that this Court has  
21 personal jurisdiction over Vivint, and Plaintiff's claim should be dismissed under Rule  
22 12(b)(2). Once a party seeks dismissal under Rule 12(b)(2), the plaintiff has the burden  
23 of demonstrating that the exercise of personal jurisdiction is proper. *Menken v. Emm*,  
24 503 F.3d 1050, 1056 (9th Cir. 2007). Although uncontroverted allegations in the  
25 complaint must be taken as true, the plaintiff cannot "simply rest on the bare allegation  
26 of its complaint." *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir.  
27 1977).

28 //



1 When determining whether it can exercise jurisdiction over a nonresident  
2 defendant, a district court must determine whether asserting jurisdiction would offend  
3 the principles of Fifth Amendment due process or conflict with the state’s long-arm  
4 statute. *Handsome Music, LLC v. Etoro USA LLC*, No. LACV2008059VAPJCX, 2020  
5 WL 8455111, at \*2 (C.D. Cal. Dec. 17, 2020).

6 Due process requires that nonresident defendants have certain “minimum  
7 contacts” with the forum state so that the exercise of jurisdiction does not offend  
8 traditional notions of fair play and substantial justice. *Int’l Shoe Co. v. Wash.*, 326 U.S.  
9 310, 316 (1945). “[I]t is essential in each case that there be some act by which the  
10 defendant purposefully avails itself of the privilege of conducting activities within the  
11 forum State, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*,  
12 357 U.S. 235, 253 (1958). “Due process requires that a defendant be haled into court in  
13 a forum State based on his own affiliation with the State, not based on the ‘random,  
14 fortuitous, or attenuated’ contacts he makes by interacting with other persons affiliated  
15 with the State.” *Walden v. Fiore*, 571 U.S. 277, 286 (2014) (quoting *Burger King Corp.*  
16 *v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

17 Here, there is no general jurisdiction over Vivint in this state because Vivint is  
18 not considered “at home” in California. Moreover, specific jurisdiction is also lacking  
19 because the exercise of personal jurisdiction over Vivint is improper under both the  
20 purposeful availment test and the purposeful direction test.

21 A court may exercise personal jurisdiction over a nonresident defendant generally  
22 or specifically. *Doe v. Am. Nat’l Red Cross*, 112 F.3d 1048, 1050 (9th Cir. 1997). For  
23 general jurisdiction to exist over a foreign corporation, its affiliations with the state must  
24 be so continuous and systematic as to render it essentially at home in the forum state.  
25 *Daimler AG v. Bauman*, 571 U.S. 117, 138–39 (2014) (citing *Goodyear Dunlop Tires*  
26 *Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)). The place of incorporation and  
27 principal place of business are “paradig[m]” bases for general jurisdiction. *Id.*

28 //

1 Courts employ a three-part test to assess whether a defendant has sufficient  
2 contacts with the forum state to be subject to specific personal jurisdiction: (1) The non-  
3 resident defendant must purposefully direct his activities or consummate some  
4 transaction with the forum or resident thereof; or perform some act by which he  
5 purposefully avails himself of the privilege of conducting activities in the forum,  
6 thereby invoking the benefits and protections of its laws; (2) the claim must be one  
7 which arises out of or relates to the defendant's forum-related activities; and (3) the  
8 exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must  
9 be reasonable. *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015).

10 Under the first prong, courts apply either a “purposeful direction” or “purposeful  
11 availment test.” Under the purposeful availment analysis, the defendant’s contacts at  
12 issue must create a “substantial connection” with the forum state such that the defendant  
13 can be said to have manifestly “availed himself of the privilege of conducting business  
14 there.” *Burger King Corp.*, 471 U.S. at 475-76. The purposeful direction test asks  
15 whether the defendant (1) committed an intentional act, (2) expressly aimed at the  
16 forum, and (3) caused harm that the defendant knew to be likely suffered in the forum.  
17 *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002) (citing *Calder v. Jones*,  
18 465 U.S. 783, 788-89 (1984)). The Ninth Circuit has explained “[a]t bottom, both  
19 purposeful availment and purposeful direction ask whether defendants have voluntarily  
20 derived some benefit from their interstate activities such that they ‘will not be haled into  
21 a jurisdiction’ solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.” *Id.*;  
22 *see also Global Commodities Trading Grp., Inc. v. Beneficio de Arroz Choloma, S.A.*,  
23 972 F.3d 1101, 1107 (9th Cir. 2020) (*quoting Burger King Corp.*, 471 U.S. at 474-75).  
24 Typically, courts apply the purposeful direction test to claims arising out of tort and the  
25 purposeful availment test to those arising out of contract. *See Schwarzenegger v. Fred*  
26 *Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

27 //

28 //



1 **1. Vivint is not subject to California’s general jurisdiction because**  
2 **Vivint is not “at home” in California.**

3 Plaintiff has not, and cannot, show that Vivint is subject to the general jurisdiction  
4 of California courts because Plaintiff has not alleged, and cannot allege, facts sufficient  
5 to establish that Vivint has such “continuous and systematic” contacts with California  
6 as to render Vivint at home in this state. *Daimler*, 571 U.S. at 138–39 (citing *Goodyear*,  
7 564 U.S. 924). Plaintiff appears to concede that California lacks general jurisdiction  
8 over Vivint, because she does not assert a single allegation to establish general  
9 jurisdiction. Plaintiff alleges that Vivint is “a New Jersey corporation with its principal  
10 place of business in Princeton, New Jersey.” (See Amended Complaint at ¶ 7.) The place  
11 of incorporation and principal place of business are “paradig[m]” bases for general  
12 jurisdiction. *Daimler*, 571 U.S. at 138–39 (citing *Goodyear*, 564 U.S. at 924). Because  
13 Vivint does not have such “continuous and systematic” contacts with California as to  
14 be considered “at home,” Vivint is not subject to this Court’s general jurisdiction.

15 **2. Vivint is not subject to specific jurisdiction because the activities**  
16 **alleged were not directed at California, and Vivint has not**  
17 **purposefully availed itself to this state.**

18 The exercise of specific jurisdiction over Vivint is likewise improper under both  
19 the purposeful direction test and purposeful availment test. Under both analyses,  
20 Plaintiff has failed to show that Vivint voluntarily derived some benefit from the  
21 activities in California that are the subject of Plaintiff’s claim against Vivint.

22 The Ninth Circuit has held that exercise of specific jurisdiction over web-based  
23 platforms is not appropriate where the platforms do not have a forum-specific focus.  
24 See *Briskin v. Shopify, Inc.*, 87 F.4th 404, 418 (9th Cir. 2023). “When a company  
25 operates a nationally available e-commerce payment platform and is indifferent to the  
26 location of end-users, the extraction and retention of consumer data, without more, does  
27 not subject the defendant to specific jurisdiction in the forum where the online purchase  
28 was made.” *Id.* at 409.

1 First, Vivint is not subject to specific jurisdiction under the purposeful availment  
2 test because Plaintiff has failed to show that Vivint performed affirmative conduct to  
3 create a substantial connection with California. Under the purposeful availment test for  
4 specific jurisdiction, Plaintiff must establish actions that create a “substantial  
5 connection” with the forum state. *Picot*, 780 F.3d at 1212 (quoting *Burger King*, 471  
6 U.S. at 475.) Merely “random, fortuitous, or attenuated” contacts are not sufficient. *Id.*  
7 (internal quotation marks omitted). A defendant must have “performed some type of  
8 affirmative conduct which allows or promotes the transaction of business within the  
9 forum state.” *Id.*

10 Plaintiff has failed to show that Vivint performed affirmative conduct specific to  
11 California. Rather, Plaintiff asserts generic, conclusory statements in an attempt to  
12 persuade the Court that personal jurisdiction is appropriate. (*See* Amended Complaint  
13 at ¶ 3.) Plaintiff’s conclusory allegations that Vivint “purposefully directed its activities  
14 to the Central District of California,” “purposefully avails itself of the California  
15 market” and “[e]xercising jurisdiction over [Vivint] would be consistent with traditional  
16 notions of fair play and substantial justice” cannot, alone, establish jurisdiction. (*See*  
17 Amended Complaint at ¶¶ 3, 5.) Further, Plaintiff’s Amended Complaint alleges that  
18 Vivint uses the TikTok Software on the Website to “captur[e] incoming electronic  
19 impulses and identifying dials, routing, addressing, and signaling information  
20 generated” by visitors to the Website. (*See* Amended Complaint at ¶ 20.)

21 Yet, nowhere in the Amended Complaint does Plaintiff assert any facts  
22 demonstrating that the Website or TikTok Software sought to appeal to the California  
23 audience in particular, prioritized California consumers, or acted in any way to focus  
24 on California. And Plaintiff merely stating that Vivint “develop[ed] a data collection  
25 process directed to citizens on (*sic*) this state” does not make it so. Plaintiff’s failure to  
26 assert more than a conclusory statement in support of purposeful availment is fatal to  
27 her claim. Because Plaintiff has failed to show more than attenuated contact between  
28 Vivint and California, Plaintiff has failed to demonstrate with reasonable particularity

1 sufficient contacts to subject Vivint to specific personal jurisdiction under the  
2 purposeful availment analysis.

3 Second, Plaintiff's allegations fail under the purposeful direction test, sometimes  
4 called the "*Calder* test." Under the purposeful direction test, the plaintiff must show  
5 that defendant (1) committed an intentional act, (2) expressly aimed at the forum, and  
6 (3) caused harm that the defendant knew to be likely suffered in the forum. *Handsome*  
7 *Music, LLC*, 2020 WL 8455111, at \*6.

8 The Amended Complaint fails to show jurisdiction under the purposeful direction  
9 test because Plaintiff has failed to demonstrate that Vivint's use of the TikTok Software  
10 was "aimed" at or "intentionally targeted" toward California. Like the purposeful  
11 availment test, Plaintiff's Amended Complaint fails to allege any fact supporting that  
12 Vivint directed its use of the TikTok Software toward California. Even if Plaintiff could  
13 show that Vivint targeted its use of the technology toward California, which it did not,  
14 Plaintiff nonetheless has failed to demonstrate that it knew that Plaintiff would suffer  
15 the brunt of the harm allegedly caused by the use of this technology in California.  
16 Although Plaintiff alleges Vivint took information from her "while she was in  
17 California," she never alleges that she accessed the website while physically located in  
18 California or that she suffered any cognizable harm. (*See* Amended Complaint at ¶ 5.)  
19 Because Plaintiff has not met the requirements of the purposeful direction test, the  
20 exercise of specific jurisdiction over Vivint is improper.

21 Neither the purposeful availment nor purposeful direction test confer specific  
22 jurisdiction over Vivint in this case, and the Amended Complaint should therefore be  
23 dismissed under Rule 12(b)(2).

24 C. **Plaintiff has failed to allege facts sufficient to state a claim under**  
25 **California's Trap and Trace Law.**

26 Dismissal under Rule 12(b)(6) is proper where there is either "a lack of a  
27 cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable  
28 legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). A

1 sufficient complaint “demands more than an unadorned, the-defendant-unlawfully-  
2 harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129, S.Ct. 1937, 1949 (2009)  
3 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff must  
4 provide “more than labels and conclusions, and a formulaic recitation of the elements  
5 of a cause of action.” *Twombly*, 550 U.S. at 555. “Threadbare recitals of the elements  
6 of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*,  
7 129 S. Ct. at 1949. The court need not “assume the truth of legal conclusions merely  
8 because they are cast in the form of factual allegations.” *Warren v. Fox Family*  
9 *Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

10 Plaintiff brings a single claim under CIPA related to use of a pen register or trap  
11 and trace device (the “Trap and Trace Law”). *See* Cal. Penal Code § 638.51. California  
12 Penal Code Section 638.51 prohibits the installation or use of “a pen register or a trap  
13 and trace device without first obtaining a court order” or “consent of the user of that  
14 service has been obtained.” Cal. Penal Code § 638.51(a), (b)(5).

15 CIPA defines a “pen register” as “a device or process that records or decodes  
16 dialing, routing, addressing, or signaling information transmitted by an instrument or  
17 facility from which a wire or electronic communication is transmitted, but not the  
18 contents of a communication.” Cal. Penal Code § 638.50(b). A “trap and trace” device  
19 has a similar definition, describing a device or process that “captures the incoming  
20 electronic or other impulses that identify the originating number or other dialing,  
21 routing, addressing, or signaling information reasonably likely to identify the source of  
22 a wire or electronic communication, but not the contents of a communication.” Cal.  
23 Penal Code § 638.50(c).

24 Historically, “pen registers” and “trap and trace” devices were tools used to  
25 capture data related to telephone calls. A pen register records outgoing phone numbers,  
26 while a trap and trace device records incoming phone numbers. Plaintiff now seeks to  
27 stretch the original intent of this provision beyond recognition.

28 //

1                   **1. Plaintiff’s application of “trap and trace device” to the Website**  
2                   **contradicts CIPA’s compliance provisions and threatens public**  
3                   **policy.**

4                   Plaintiff’s attempt to squeeze the use of the TikTok Software into the definition  
5 of “trap and trace device” both conflicts with CIPA’s compliance provisions and  
6 threatens to create absurd public policy outcomes.

7                   CIPA limits the use of pen register and trap and trace devices to specific law  
8 enforcement purposes and requires that an order approving their use specify “the  
9 identity, if known, of the person to whom is leased or in whose name is listed the  
10 telephone line to which the pen register or trap and trace device is to be attached” and  
11 the identity “of the person who is the subject of the criminal investigation.” Cal. Penal  
12 Code § 638.52(d)(1)-(3). These compliance provisions, incorporated into the Trap and  
13 Trace Law by reference, demonstrate that the law refers specifically to telephonic  
14 communications, and not to internet connected devices.

15                  Plaintiff alleges that the TikTok Software is “a process to identify the source of  
16 electronic communications,” mirroring the language of the statute. (*See* Amended  
17 Complaint at ¶ 20.) Yet, simply reasserting the statute’s language is insufficient to apply  
18 the statute. The legislature, in Section 638.52, contemplated the connection to a  
19 particular person or telephone line in its drafting of the Trap and Trace Law. Unlike a  
20 traditional telephone or telephone line, <https://www.vivint.com> is a consumer-facing  
21 website with, as Plaintiff has alleged it, user-agnostic software. The “trap and trace  
22 device” as alleged by Plaintiff cannot be traced to a specific individual or phone line,  
23 as contemplated in Section 638.52. Plaintiff’s theory warps the text and meaning of the  
24 Trap and Trace Law far beyond its intended use and creates absurdities in the  
25 compliance section of the statute.

26                  Further, at least one California court has noted the negative public policy  
27 implications of allowing this skewed interpretation of the Trap and Trace Law. It  
28 remarked, “public policy strongly disputes Plaintiff’s potential interpretation of privacy

1 laws as one rendering every single entity voluntarily visited by a potential plaintiff,  
2 thereby providing an IP address for purposes of connecting the website, as a violator.”  
3 *Licea v. Hickory Farms LLC*, No. 23STCV26148, 2024 WL 1698147, at \*4 (Cal. Super.  
4 Mar. 13, 2024). The court went on to say that “[s]uch a broad based interpretation would  
5 potentially disrupt a large swath of internet commerce” and raises concerns about  
6 creating liability without any preexisting relationship between the parties beyond  
7 internet host and internet user. *Id.*

8 This Court should likewise decline to expand the scope of the Trap and Trace  
9 Law to tangential internet relationships that were not contemplated at the time of the  
10 law’s passage.

11 **2. Plaintiff consented to Vivint’s use of the TikTok Software.**

12 The exact conduct of which Plaintiff complains was explicitly disclosed to her in  
13 Vivint’s Privacy Policy. (*See* RJN, Exhibit B.) Her consent defeats her claim. *See* Cal.  
14 Penal Code § 638.51(b)(5) (creating an exception to liability when a user consents).

15 The question of consent boils down to whether Plaintiff was put on notice of the  
16 alleged conduct. That answer is yes. Indeed, courts within this district “consistently hold  
17 that terms of service and privacy policies . . . can establish consent to the alleged conduct  
18 challenged under various states wiretapping statutes and related claims” at the motion  
19 to dismiss stage. *Silver v. Stripe Inc.*, No. 4 :20-CV-08196-YGR, 2021 WL 3191752, at  
20 \*4 (N.D. Cal. July 28, 2021) (collecting cases under similar CIPA claims). Plaintiff’s  
21 threadbare allegations of lack of consent (*See* Amended Complaint at ¶¶ 16, 22, 24, 36)  
22 are not entitled to any weight. *See, e.g., Iqbal*, 556 U.S. at 678 (“Threadbare recitals of  
23 the elements of a cause of action, supported by mere conclusory statements, do not  
24 suffice”).

25 Plaintiff’s consent to the Privacy Policy during her browsing on the Vivint  
26 website constitutes agreement to the use of website enhancement technology, including  
27 the TikTok Software. A contract entered on the internet is enforceable if it puts a  
28 website user on actual or inquiry notice of the site’s terms. *Nguyen v. Barnes & Noble*



1 *Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014). It is enough that “a plaintiff is provided with  
2 an opportunity to review the terms of service in the form of a hyperlink”; if that exists,  
3 the plaintiff has agreed to “[a] binding contract.” *Moretti v. Hertz Corp.*, No. C 13-  
4 02972 JSW, 2014 WL 1410432, at \*2 (N.D. Cal. Apr. 11, 2014); *Javier v. Assurance*  
5 *IQ, LLC (Javier I)*, No. 4:20-CV-02860-JSW, 2021 WL 940319, at \*3-4 (N.D. Cal.  
6 Mar. 9, 2021).

7       The express disclosures throughout the Privacy Policy are more than adequate to  
8 put a reasonable person on notice that Vivint uses website enhancement technology like  
9 the TikTok Software; that the record data collected from this technology may be shared  
10 with third parties; and that the technology is used to promote site functionality and for  
11 marketing. (See RJN, Exhibit B.) Accordingly, Plaintiff’s claims must be dismissed.  
12 See, e.g., *Smith v. Facebook, Inc.*, 745 F. App’x 8, 8-9 (9th Cir. 2018) (dismissing a  
13 similar CIPA claim associated with website enhancement technology where “[a]  
14 reasonable person viewing those disclosures would understand that Facebook maintains  
15 the practices of (a) collecting its users’ data from third-party sites and (b) later using the  
16 data for advertising purposes”); *Garcia v. Enter. Holdings, Inc.*, 78 F. Supp. 3d 1125,  
17 1136 (N.D. Cal. 2015) (taking judicial notice of “documents proffered by Defendants  
18 establish[ing] that in order to sign up for and use [the application], a user must agree to  
19 the [terms] and Privacy Policy” and dismissing CIPA claims despite plaintiff’s  
20 conclusory allegation of lack of consent).

21       Plaintiff cannot maintain a Trap and Trace Law claim against Vivint where the  
22 law creates an explicit exception for consent, and Plaintiff was on notice as to the use  
23 of technology like the TikTok Software.

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1 **IV. CONCLUSION**

2 For the reasons stated above, Vivint respectfully requests that this Court grant its  
3 Motion and dismiss, with prejudice, all allegations in the Amended Complaint.

4  
5 DATED: September 3, 2024

FROST BROWN TODD LLP

6  
7 By: 

8 LIAM E. FELSEN  
9 Attorneys for Defendant  
10 VIVINT. INC.  
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FROST BROWN TODD LLP  
LOS ANGELES



**CERTIFICATE OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is Frost Brown Todd LLP, 633 W. Fifth Street, Suite 900, Los Angeles, CA 90071.

On September 3, 2024, I served the following document(s) on the interested parties in this action: **DEFENDANT VIVINT'S NOTICE OF MOTION, MOTION TO DISMISS, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT**

☐ by placing the original and/or a true copy enclosed in (a) sealed envelope(s), addressed as follows:

Robert Tauler  
TAULER SMITH LLP  
626 Wilshire Boulevard, Suite 550  
Los Angeles, CA 90017

Attorney for Plaintiff:  
Dana Hughes  
Phone: (213) 927-9270  
Email: robert@taulersmith.com

☒ **BY CM/ECF SYSTEM:** Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

☐ **BY REGULAR MAIL:** I placed such envelope with postage fully paid in the United States mail at Los Angeles, California. I am "readily familiar" with this firm's practice of collecting and processing correspondence for mailing. It is deposited with U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

☐ **BY ELECTRONIC SERVICE:** I caused the document(s) to be sent to the persons at the electronic notification address listed in the Service List.

☒ (Federal) I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made.

Executed on September 3, 2024, at Los Angeles, California.

/s/ Julia Evans

Julia Evans

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